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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re A.B. et al., Persons Coming Under the
Juvenile Court Law.

ORANGE COUNTY SOCIAL SERVICES
AGENCY,

Plaintiff and Respondent,

v.

P.H. et al.,

Defendants and Appellants.

G042282

(Super. Ct. Nos. DP016097,
DP013783)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Caryl
Lee, Judge. Affirmed.

Nicole Williams, under appointment by the Court of Appeal, for Defendant
and Appellant Mother P.H.

William D. Caldwell, under appointment by the Court of Appeal, for
Defendant and Appellant Father J.B.

Nicholas S. Chrisos, County Counsel, Karen L. Christensen and Jeannie Su,
Deputy County Counsel, for Plaintiff and Respondent.

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P.H. (mother) and J.B. (father) appeal from the juvenile court's order terminating their parental rights to their son A.B. (born in October 2007). They claim the court erroneously denied mother's modification petition (Welf. & Inst. Code, § 388)¹ without an evidentiary hearing, and erred in rejecting the "continuing benefit" exception to termination of parental rights (§ 366.26, subd. (c)(1)(B)(i)). For the reasons expressed below, we affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

In July 2006, mother gave birth to A.B.'s sibling John. Mother and John both had methamphetamine in their systems at the time of his birth. Mother, who had abused methamphetamine since the age of 11 or 12, admitted using the drug during the pregnancy. Father, who was not married to mother, also had a history of drug-related criminal behavior.²

Mother pleaded no contest to the allegations of the Orange County Social Services Agency's (SSA) petition that mother's substance abuse posed a substantial risk her child would suffer serious harm. (§ 300, subd. (b).) The juvenile court declared A.B. a dependent of the court and offered mother reunification services. Her case plan directed her to participate in counseling, a parenting education program, and an outpatient substance abuse program, including random drug testing. John was placed with his paternal grandparents.

¹ All statutory citations are to the Welfare and Institutions Code unless noted.

² Father was in jail or prison during most of the dependency proceedings. He supports mother's appeal in the belief A.B. should live with mother so he can maintain and nurture a relationship with the children.

By the six-month review in February 2007, mother had failed to participate in drug treatment or drug testing and was terminated from her drug program. She also missed appointments with the social worker. Mother consistently visited John, however, and the social worker noted her interaction with the child was positive. Mother's failure to submit drug tests prevented the social worker from authorizing increased visitation. In May 2007, the court terminated mother's reunification services, but ordered additional services for father and scheduled a 12-month review for July 2007.

In July 2007, mother began residing at Heritage House, a residential substance abuse treatment facility. She was pregnant with A.B., the child at issue in this appeal. In early August, mother began serving a 30-day jail sentence for petty theft. At the end of the month, the juvenile court terminated father's reunification services concerning John, and scheduled a permanency planning hearing (§ 366.26 (.26 hearing)) for December 19, 2007.

Mother gave birth to A.B. in early October 2007. SSA filed a dependency petition based on mother's failure to participate in reunification services for John. The court released A.B. to mother under SSA's supervision, and mother immediately returned to Heritage House with her infant son. The program required mother to randomly drug test, and to participate in daily group therapy, including relapse prevention, anger management, and parenting. She also received individual counseling each week, and attended daily Alcoholics Anonymous/Narcotics Anonymous meetings.

As of early November, mother was doing well in the program and testing free of drugs. She pleaded no contest to the allegations in the dependency petition. The court declared A.B. a dependent of the court and placed the child with mother. The court required mother to participate in family maintenance services, which included

counseling, parenting education, outpatient substance abuse treatment, substance abuse testing, and participation in a 12-step program.

John's paternal grandparents agreed to become the child's legal guardians, a relationship they preferred over adoption. The social worker recommended guardianship as John's permanent plan. The grandparents also agreed to let mother and A.B. reside with them once mother graduated from Heritage House.

In January 2008, mother's counselor reported mother was doing well in her program, although she had a few "noncompliance checks" during a two-week period in December 2007. This occurred because father had been incarcerated near the location of mother's program and consequently she had focused her attention on him. The social worker expected mother to continue her progress, however, because father no longer was in the area.

In February 2008, mother filed a modification petition (§ 388) requesting the court return John to her custody or order additional reunification services. The court found she had made a prima facie showing and granted the petition after a hearing, vacating the section .26 hearing. The court directed mother to continue participating in case plan activities and set a review hearing in June 2008.

In March 2008, mother graduated from the substance abuse program and stated she would continue with the 22-week aftercare program, which required weekly drug testing, individual and group counseling, and 12-step meetings. The social worker recommended a 60-day trial visit with John at the paternal grandparents' home.

In June 2008, the social worker reported both children were doing well in mother's care. The court terminated jurisdiction in A.B.'s case with the social worker's

recommendation. The court ordered family maintenance services in John's case and set a review hearing for December 2008.

Mother's progress took a sudden turn for the worse, however. She tested positive for methamphetamine in early July, and had several diluted and missed tests. In mid-August, the grandmother found mother's stash of drugs and ordered her out of the house. Mother lived on the streets and used methamphetamine almost every day. According to the social worker, she was arrested for possessing "counterfeit access cards" in October 2008.

SSA filed a new dependency petition for A.B. and sought to remove John from mother's custody. A.B., now 11 months old, eventually was placed with a maternal uncle and his wife in September 2008.

Mother reentered Heritage House in mid-October. In December 2008, mother's therapist reported mother was doing well in the program's structured environment, but it was too early to forecast whether she would continue to progress. The therapist described mother's relationship with father as toxic and believed mother would jeopardize her sobriety if she continued her relationship with him. Although father was still incarcerated, mother exchanged several letters with him.

In December 2008, mother pleaded no contest to A.B.'s new petition and the petition to modify John's status. At the disposition hearing in January 2009, the court denied reunification services and scheduled a section .26 hearing for May 2009.

Mother gave birth to daughter C. in late April 2009, and moved into a Heritage House sober living home. SSA filed a dependency petition for C., but the court allowed the infant to remain with mother.

Mother's visits with her sons were positive. She was attentive and engaged them appropriately. A.B.'s caretakers desired to adopt him and his social worker recommended termination of parental rights and adoption as his permanent plan.

In May 2009, mother filed a modification petition asking the court to vacate the section .26 hearing and order additional reunification services. Mother's declaration stated she had been sober since October 17, 2008, and had reentered the Heritage House program with a different mindset. Recognizing father was a negative influence on her, she cut all ties with him to maintain her sobriety. After graduating from the residential portion of Heritage House for the second time in January 2009, she proceeded directly into a sober living home and met regularly with a new sponsor. She believed her recent period of sobriety was significantly different from her previous periods. She described her close relationship with A.B. and explained why it was in his best interests to grant her petition.

On May 28, 2009, the juvenile court denied mother's modification petition without an evidentiary hearing. The court observed that finishing the Heritage House residential program and separating from father were positive steps, but mother had previously relapsed after similar efforts. Mother was just beginning the aftercare stage of her treatment, and section 388 did not apply because mother's situation was "changing" rather than "changed." The court terminated parental rights in A.B.'s case. In John's case, the court ordered a permanent plan of legal guardianship. The parents appeal from the order in A.B.'s case.

II

DISCUSSION

A. *The Trial Court Did Not Abuse Its Discretion in Denying Mother a Hearing on Her Section 388 Petition*

Mother contends the court abused its discretion when it summarily denied her modification petition under section 388. We disagree.

Section 388 serves “as an ‘escape mechanism’ to ensure that new evidence may be considered before the actual, final termination of parental rights.” (*In re Hunter S.* (2006) 142 Cal.App.4th 1497, 1506.) Under section 388, subdivision (a), a parent “may, upon grounds of change of circumstance or new evidence, petition the court . . . for a hearing to change” a previous court order. “If it appears that the best interests of the child may be promoted by the proposed change of order, . . . the court shall order that a hearing be held” (§ 388, subd. (d).) Conversely, “[i]f the liberally construed allegations of the petition do not show changed circumstances such that the child’s best interests will be promoted by the proposed change of order, the dependency court need not order a hearing.” (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.) Allegations of changing, rather than changed, circumstances are not sufficient to warrant a hearing. (See *In re Casey D.* (1999) 70 Cal.App.4th 38, 49.) Moreover, “the change of circumstances or new evidence must be of such significant nature that it requires a setting aside or modification of the challenged prior order.” (*Ansley v. Superior Court* (1986) 185 Cal.App.3d 477, 485.) A juvenile court’s summary denial of a section 388 petition is reviewed for an abuse of discretion (*In re Stephanie M.* (1994) 7 Cal.4th 295, 316-318) and we must affirm unless the decision ““exceeded the bounds of reason.”” (*In re Brittany K.* (2005) 127 Cal.App.4th 1497, 1505.)

Factors circumscribing the juvenile court's discretion in evaluating a modification petition, and informing our review, are: "(1) [T]he seriousness of the problem which led to the dependency, and the reason for any continuation of that problem; (2) the strength of relative bonds between the dependent children to *both* parent and caretakers; and (3) the degree to which the problem may be easily removed or ameliorated, and the degree to which it actually has been." (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 532, original italics.) As the Supreme Court has explained, "[A] primary consideration in determining the child's best interests is the goal of assuring stability and continuity. [Citation.] 'When custody continues over a significant period, the child's need for continuity and stability assumes an increasingly important role. That need will often dictate the conclusion that maintenance of the current arrangement would be in the best interests of that child.' [Citations.]" (*In re Stephanie M.*, *supra*, 7 Cal.4th at p. 317.)

Mother contends the significant changes she made after her relapse entitled her to a hearing. Specifically, she points to her immediate entry into a sober living home after completing the residential portion of the program, and the guidance she received from a new sponsor. But mother, a longtime methamphetamine abuser, had been down this road before, only to suffer a relapse after successfully completing the same Heritage House program. True, Mother now recognized the need for vigilance in her aftercare treatment, but this only serves to underscore the fact she does well in a structured setting, but failed to provide the court a basis to believe she could maintain sobriety without the help of others, especially in light of her lengthy history of drug abuse. Indeed, at the time she filed the section 388 petition, she only had begun the early stages of the aftercare phase of the Heritage House program. The juvenile court therefore could reasonably

conclude mother's current period of abstinence, without the stressors of daily childcare, lacked permanence. (*In re Clifton B.* (2000) 81 Cal.App.4th 415, 423-424.)

Mother argues "one of the most important changes" she made was cutting ties with father "so as to not jeopardize her sobriety." But as of May 2009, her assertion had not been tested. The couple had a new daughter, conceived during mother's recent relapse. Father was scheduled to be released from incarceration in September 2009. As the juvenile court noted at the disposition hearing in January 2009, "the quotation from mom today was, I realize today that we [father and her] are no good for each other. Now, it's been this long with all these other flags that are flying and now it's today that she realizes that we're no good for each other. And *I am still not convinced that there wouldn't be contact in the future*, . . . because they do have children together. That's a stressor and a trigger for relapse and the court is simply not going to wait for something terrible to happen." (Italics added.)

Mother argues the court required her to actually prove the contents of her petition, and that "[s]hort of actual testimony, it is unclear what more [she] could have done in order to have her day in court on her 388 petition." But the juvenile court was well acquainted with mother and the record in this case. It had granted mother's previous section 388 petition that returned John to her care. It was capable of putting mother's current achievements in context when deciding whether an evidentiary hearing on her new section 388 petition was warranted.

Mother's reliance on *In re Aljamie D.* (2000) 84 Cal.App.4th 424 is misplaced. There, the appellate court held the mother was entitled to a hearing on her modification petition because, among other reasons, she had completed her case plan, including drug rehabilitation and parenting classes and tested clean in weekly random

drug tests for over *two years*. Obviously, mother here has not demonstrated anything like this, but instead has been caught in cycles of sobriety and relapse. Moreover, the children in *Aljamie D.* were older and had lived with mother for years before the juvenile court intervened, and were able to express their strong preferences to continue living with their mother. (See also *In re Hashem H.* (1996) 45 Cal.App.4th 1791, 1799 [mother showed continuous participation in therapy for more than 18 months, regular visitation with her son for more than 1 year, participation in joint counseling with him, stable employment and religious affiliation, and ability to provide home; and supporting letter from therapist recommended that son be returned to her]; *In re Jeremy W.* (1992) 3 Cal.App.4th 1416 [mother drug-free for more than one year, obtained therapy, and had established a stable home]; cf. *In re Angel B.* (2002) 97 Cal.App.4th 454, 462-463 [juvenile court did not abuse its discretion in concluding mother's petition failed to make prima facie showing where mother's sobriety was brief compared to her many years of drug addiction and child had lived with family that wished to adopt].)

Here, the juvenile court also found the petition did not state a prima facie case that A.B.'s best interests would be promoted by the proposed change of order. Mother's petition asserted A.B. deserved a chance to live with his "sober mother and his new sister" and that she and A.B. had "an unbreakable bond" that was unmatched by any other person. The argument collapses on mother's assertion of sobriety, a fact that had not been established. Also, the juvenile court observed that although mother had quality visits with her son, A.B. had been with his caretakers for eight months of his young life and they tended to his daily needs. Indeed, mother does not dispute A.B. had a bond with his caretakers. The Legislature has determined generally that reunification services for a child under age three should not exceed six months from the dispositional hearing.

(§ 361.5, subd. (a)(1)(B).) The juvenile court could reasonably conclude it was not in A.B.'s best interests to remain in a state of impermanency until his mother had demonstrated she could safely care for him.

This case bears no resemblance to *In re Kimberly F.*, *supra*, 56 Cal.App.4th 519, which mother cites. There, it was evident the mother had shown changed circumstances — her home was no longer in an unsanitary and unsafe condition when she petitioned under section 388. The court noted the best interests test is not a simple comparison between the natural parents' and caretakers' households, but must take into account familial relationships, attachments, and bonds, including the child's formative years with a natural parent.

Here, nothing in the record suggests the court based its best interests finding on a facile determination the foster parents' home was simply better than mother's. At this stage, the juvenile court must shift its focus to the child's need for permanency and stability. Consequently, where reunification services have been terminated, a parent seeking modification must demonstrate how a resumption of reunification services would promote the best interests of the child. (*In re Stephanie M.*, *supra*, 7 Cal.4th at p. 317.) Mother's longstanding methamphetamine addiction coupled with the fact she had just begun the aftercare phase of her recovery supports the juvenile court's finding she failed to make the requisite showing.

B. *Substantial Evidence Supports the Juvenile Court's Conclusion the Benefit Exception Did Not Apply*

Mother also challenges the sufficiency of the evidence supporting the juvenile court's rejection of the continuing benefit exception to the termination of her parental rights. (§ 366.26, subd. (c)(1)(B)(i); former § 366.26, subd. (c)(1)(A).) She emphasizes that she resided with A.B. for the majority of his life, and the bond existing

between them continued even after he was removed from her custody. Mother contends her modification petition described in great detail the positive nature of their relationship which “can only be characterized as a beneficial parental relationship deserving of protection”

The benefit exception authorizes the juvenile court to avoid terminating parental rights if it finds ““termination would be detrimental to the child [because] . . . [t]he parents or guardians have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.”” (*In re Clifton B.*, *supra*, 81 Cal.App.4th at p. 424.) Once a parent fails to reunify with a child during the prescribed statutory period and the juvenile court terminates reunification services, the parent bears the burden of proving termination of parental rights would be detrimental to the child. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350 (*Jasmine D.*)). The benefit exception does not permit a parent to thwart the permanency and stability of adoption merely by showing the child would derive some benefit from continuing a relationship maintained during periods of visitation with the parent. (*Id.* at p. 1348.) Instead, the benefit exception applies only if “the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents.” (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575 (*Autumn H.*)).

Autumn H. explains the requisite analytical framework: “[T]he court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the

preference for adoption is overcome and the natural parent's rights are not terminated.” (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) Thus, “the juvenile court must engage in a balancing test, juxtaposing the quality of the relationship and the detriment involved in terminating it against the potential benefit of an adoptive family.” (*In re Clifton B.*, *supra*, 81 Cal.App.4th at pp. 424-425.) Factors bearing on the parent-child bond include “[t]he age of the child, the portion of the child’s life spent in the parent’s custody, the ‘positive’ or ‘negative’ effect of interaction between parent and child, and the child’s particular needs” (*Autumn H.*, at p. 576.)

Even if these factors reveal a strong bond, the parent faces a heavy burden to overcome the Legislature’s preferred permanent plan of adoption. (See § 366.26, subd. (b)(1) [identifying adoption as preferred plan]; see also *Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1348 [“Adoption is the Legislature’s first choice because it gives the child the best chance at [a full emotional] commitment from a responsible caretaker”]; *In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1419 [the “most permanent and secure alternative” of adoption affords children “the best possible opportunity to get on with the task of growing up”].) Stability and permanence become paramount goals once reunification efforts cease. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) By the section 366.26 hearing, the dependent child “is entitled to stability now, not at some hypothetical point in the future.” (*In re Megan S.* (2002) 104 Cal.App.4th 247, 254.) Thus, the statutory exceptions to termination, including the benefit exception, “merely permit the court, *in exceptional circumstances* [citation], to choose an option other than the norm, which remains adoption.” (*In re Celine R.* (2003) 31 Cal.4th 45, 53, original italics.) We must affirm the juvenile court’s conclusion the benefit exception did not

apply if substantial evidence supports the order. (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 576.)

At the section .26 hearing, mother objected to the court's findings for the record but "elected not to go through testimony for a [section] 366.26 hearing feeling that . . . [mother] would not be able to prove up at [the] hearing that" a continuing relationship would benefit A.B. Mother bore the burden in the juvenile court of proving termination of parental rights would be detrimental to A.B.³ But notwithstanding any concession, substantial evidence supports the court's rejection of the benefit exception to the termination of parental rights. Mother had custody of A.B. for the first nine or 10 months of his life, although she admittedly abused drugs during the latter portion of this period. Mother maintained consistent and regular contact with A.B. after he was removed from her care, visiting him twice a month for eight to 10 hours each. Mother was appropriately parental during visits and A.B. appeared to enjoy his time with mother, referring to her as "ma" and his caretaker as "sissy." Mother stated A.B. was always excited to see her, and cried when visits ended.

But a social worker observing a visit in May 2009 reported that A.B. went to his caretakers, his uncle and aunt, if he needed anything. They had cared for him since he was 11 months old and he "only knows this family as his family." They showed "a great deal of commitment to [him]. They have both been active in his life since infancy . . . and consider [him] as one of their children They are eager to finalize the adoption . . . and formally have him as a son."

³ Mother cites to her declaration submitted in support of her section 388 modification petition. Because the juvenile court impliedly assumed her allegations to be true in denying the petition without an evidentiary hearing, we make the same assumption when evaluating her claim of detriment under section 366.26, subdivision (c)(1)(B)(i).

The record does not reflect A.B. will be greatly harmed by terminating the parental relationship. Mother's contact had not led to the type of substantial, positive emotional attachment indicating he would suffer harm if the court terminated parental rights. The evidence here falls far short of what is required on appeal to overturn the juvenile court's no-detriment findings under the benefit exception. (See *In re S.B.* (2008) 164 Cal.App.4th 289, 298-301; *In re Amber M.* (2002) 103 Cal.App.4th 681, 690-691; *In re Jerome D.* (2000) 84 Cal.App.4th 1200, 1207-1209.) Substantial evidence supports the juvenile court's conclusion termination of parental rights would not cause A.B. detriment.

III

DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

FYBEL, J.